Supreme Court, U.S.
FILED

98 955 DEC 9 1998

No.

In The

Supreme Court of the United States

October Term, 1997

CHAU K. THAI,

Petitioner,

vs.

BOARD OF REVIEW,
NEW JERSEY DEPARTMENT OF LABOR

Respondent.

On Petition for a Writ of Certiorari to the New Jersey Supreme Court

PETITION FOR A WRIT OF CERTIORARI

TINA VELANTZAS-AUSTIN
Counsel of Record
Attorney for Petitioner
The Court Commons
Seven Elm Row
P.O. Box 780
New Brunswick, NJ 08903-0780
(732) 247-5520

39 pp

QUESTION PRESENTED

Whether telephonic appeals hearings relying on "faceless testimony"[1] violate the due process clause of the Fourteenth Amendment of the United States Constitution when substantial Property Rights as Unemployment Compensation Benefits are at stake.

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[1]The term "faceless testimony" appeared in the New Jersey Law Journal, November 9, 1998 to address the danger in not being allowed to observe direct testimony of witnesses to assess credibility as in the Microsoft antitrust case now in the court.

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Petitioner, Chau K. Thai, prays that this Writ of Certiorari issue.

OPINIONS BELOW

The unreported New Jersey Appellate Division opinion dated April 29 is reproduced in the Appendix at App.2a-4a. The unreported decisions of the Appeal Tribunal of the New Jersey Department of Labor dated October 8, 1996 and July 18, 1996 are reproduced in the Appendix at App.7a-11a and App.16a-21a.

STATEMENT OF JURISDICTION

The Order denying discretionary review of the judgment below by The New Jersey Supreme Court, the highest applicable state court, was entered on September 10, 1998 and reproduced in the Appendix at App.1a. This Court has jurisdiction to review the judgment under U.S.C.A. 1257(3) where a state procedure "is drawn in question on the ground of its being repugnant to the Constitution, . . . or laws of the United States . . . "

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FEDERAL:

The Fourteenth Amendment to the United States Constitution provides in part:

> Section 1 . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATE:

N.J.A.C. 1:12-14.5

"The Board of Review or appeal tribunal, in its discretion, may initiate or schedule telephone hearings...."

STATEMENT OF THE CASE

Petitioner Chau K. Thai ("Thai") was employed as a cost accountant by Olsten Staffing Services ("Olsten"), a temporary employment agency, from December 12, 1994 until April 5, 1996. Thai and the supervisor of her temporary position at Bristol-Myers Squibb both advised the Olsten temporary agency that Thai's long term assignment would end April 4, 1996.

Previously, prior to April 1996, when petitioner advised Olsten that an assignment had been completed, Olsten would contact petitioner when new assignments became available. Each time an assignment ended in the past, petitioner filled out her time sheet the same way by checking off the box labeled completed on her time sheet and sending it to Olsten within the required 48 hours after the completion of an assignment. Thus, petitioner notified Olsten as she had done in the past. In the meantime while looking for a job and waiting for an assignment from Olsten, petitioner, as is her right, applied for unemployment benefits, Olsten objected stating the claimant voluntarily left her job because she had not filled out the completed assignment form properly. Petitioner was denied all benefits by the Deputy at the Unemployment Office.

The first fact-finding Appeal Tribunal hearing was held on July 2, 1996 and July 9, 1996 with the examiner, claimant and one employer representative, in person, face-to-face. The

proceedings were tape-recorded. The Appeal Examiner found no disqualification as to the issue of whether claimant left her job voluntarily but excluded six weeks benefits. App.20a. However, on further appeal, the Board of Review remanded the matter back to the Appeal Tribunal on August 27, 1996 because the audio tape of the hearing was incomplete and inaudible. App.14a.

Thereafter, petitioner received another Notice Of In-Person Hearing to be held on September 23, 1996. App.12a. Petitioner appeared alone at the Appeal Tribunal to find that the employer was on the telephone rather than in person as expected. An electrical failure stopped the proceeding. The appeals examiner then made arrangements to conduct the hearing on the telephone the next day. Moreover, the examiner in scheduling a telephonic hearing the next day without the proper notice or conditions to the petitioner of such a hearing including the introduction of more documents arbitrarily circumvented the terms of telephone hearings regulation, N.J.A.C. 1:12-14.5. For example, the examiner did not advise petitioner that she could at least voice an objection to a telephone hearing. The State admits that the examiner quickly rescheduled the matter for the next day.

Thus, the second Appeal Tribunal hearing was held over the telephone on September 24, 1996 and tape-recorded. Below as pro se, petitioner expressed in her Appellate papers that she felt at a "disadvantage in defending herself" having the hearing on the telephone. Moreover, she had more difficulty with expressing herself in English over the telephone. Petitioner is from Viet Nam. In addition, it was difficult to review documents over the telephone.

During this telephonic fact-finding rehearing on September 24, 1996, petitioner was home alone. However, for the rehearing, two employer representatives (instead of

one as at the first hearing) testified sitting together side by side at the employer's business offices. The appeals examiner was in a third location in an office of the Department of Labor. After this telephonic fact-finding hearing, the same appeals examiner reversed his previous decision based on the face-to-face hearing which granted benefits to the petitioner except for a few weeks' disqualification. After the telephonic hearing, this same examiner denied petitioner all unemployment benefits.App.11a. Petitioner was ordered to refund the $4000.00 that she had been awarded..

The Board of Review affirmed the Appeals Tribunal on December 9, 1996. App.5a. The New Jersey Appellate Division affirmed on April 29, 1998. App.2a. The New Jersey Supreme Court denied discretionary review on September 10, 1998. App.1a.

REASONS FOR GRANTING THE WRIT

It is of utmost importance to insure that the precious due process and equal protection rights under the Constitution are not compromised and chipped away merely for convenience. No one can deny that the deprivation of unemployment benefits is of imperative public importance.

Telephone appeals hearings involving substantial property interests as unemployment compensation benefits should be addressed by this Court. These telephonic hearings which hide the demeanor of witnesses reduce due process to a sham by providing a better opportunity for witnesses to lie under oath. This crucial synergic combination of seeing and hearing a witness and effective cross-examination is lost over the telephone. Moreover, there are no safeguards to prevent coaching of witnesses located in different locations. And those who have not mastered the English language are further prejudiced.

Telephonic appeal hearings are just another onslaught on the fundamental due process and equal protection rights afforded by the Constitution. This Court must keep a tight reign on States' arbitrary and capricious actions that negatively impact our Constitution merely for expediency as in the case at bar.

Caution must dictate that telephonic hearings which would deprive citizens of due process rights do not emerge as the proverbial "camel's nose under the tent" to destroy our fundamental due process and equal protection rights. If this Court does not address this issue now more and more citizens will suffer unjustly. Telephonic hearings provide yet another avenue for faceless witnesses to lie easily under oath, unseen, undercover. The fact alone, that perjury would "rear its ugly head" more often during telephonic hearings should make this Court hypervigilant.

WHETHER TELEPHONIC APPEALS HEARINGS RELYING ON "FACELESS TESTIMONY" VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION WHEN SUBSTANTIAL PROPERTY RIGHTS AS UNEMPLOYMENT COMPENSATION BENEFITS ARE AT STAKE.

The Constitution mandates that a person not be deprived of property absent due process of law. The granting or denial of unemployment compensation benefits should not be trivialized through telephone appeals hearings. Much too often these benefits are the "sole source of income".

In *Board of Regents v. Roth*, 408 U.S. 564 (1972), this Court stressed that a person's interest in a benefit is a property interest and "[i]t is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined". Certainly, workers rely all too often on unemployment benefits to lessen the devastation and pain associated with a lost livehood..

There is a dispute among the circuits, state courts and administrative agencies throughout the land as to whether telephonic hearings are a violation of due process and/or what sag when important benefits are at stake.

In *State of New Mexico, ex rel. Human Services Department v. Gomez*, N. M., 657 P.2d 117 (1982), (involving AFDC benefits), the Court of Appeals of New Mexico stressed the importance of the observing the demeanor of witnesses. The *Gomez* court relied upon, among other decisions in: the Seventh Circuit's holding in *S. Buchsbaum & Co. v. Federal Trade Commission*, 153 F.2d 85, 87 (7th Cir.1946);*Supplemental Opinion*, 160F.2d 121

(1947)(involving a hearing before the Federal Trade Commission) where the Seventh Circuit stressed that an examiner had "the duty of observing the demeanor of witnesses, for [if not] this would amount to a lack of due process."; and in the Seventh's Circuit's holding in *U.S. v. Raddatz*, 592 F.2d 976, 519 (7th Cir. 1979) stressing the "wisdom of traditional practice" that errors can be "substantially reduced by simply requiring the trier of fact to hear and observe the witnesses."

In contrast, the Supreme Court of New Mexico overruled *Gomez* (with Senior Justice Sosa dissenting) the Court of Appeals decision above and adopted the dissent in the Court of Appeals voting to uphold the constitutionality of telephonic hearings.

In *Archem Inc. v. Simo*, 549 N.E.2d 1054 (Ind. App. 1990), *cert. dismissed*, 498 U.S. 1076 (1991), the Indiana Appeals Court focused on the cross-examination defect of telephonic hearings and ruled that "effective cross-examination was thwarted.... by a telephonic cross-examination".

In *Stone v. Department of Employment Security Board Of Review, et al.*, 572 N.E.2d 412 (Ill..App.2Dist. 1991), the Illinois Appellate Court held that in certain cases as in the case at bar, if "the outcome of a hearing is so dependent on the credibility of witnesses, an aggrieved party must be allowed to testify in person if he so chooses". Choice of telephonic hearings knowingly and willingly would of course, cure any due process defects.

In the case at bar with similar facts as *Stone*, the credibility of the witnesses was crucial because the outcome turned on the conflicting oral testimony of the petitioner and the employer's representatives, all unseen by the examiner.

When the examiner had observed the demeanor of all the witnesses in the face-to-face hearing, he found in most part for the petitioner. When the rehearing was conducted *de novo* on the telephone now with two employer representatives, the examiner reversed his decision and denied all benefits to petitioner.

Besides the due process defects in telephonic hearings, the arbitrary and capricious manner in which the State scheduled such hearings is also a violation of the equal protection clause of the Fourteenth Amendment.

Even in those courts which uphold telephonic hearings as constitutional, there seems to be a reluctance to do so since some of these courts search to find at least some safeguard in the process or else perceived some legitimate reason for conducting telephonic hearings. For example, in *Wright v. Unemployment Compensation Board of Review*, 554 N.E..2d 137,139 (Ohio App. 1988), the Ohio Court of Appeals based its decision to uphold the constitutionality of the telephonic hearing on the fact that the claimant was represented by counsel. In the case at bar, however, petitioner was home alone without counsel.

Even when the telephonic hearing yielded a defective transcript as in the *Matter Of Kilgallen*, 635 N.Y.S.2d 109, (A.D. 3 Dept. 1995), the New York Appellate Division ruled there was no violation of due process but in *Matter of Hoffman*, 525 N.Y.S. 2d 423 (A.D. 3 Dept. 1988), the court used the fact that the employer was located in Wisconsin to justify the telephone hearing. Petitioner concedes that there may be those special circumstances that a telephone hearing with substantial safeguards is necessary. In the case at bar, there was no good cause shown to justify a telephonic hearing.

Other courts as the Florida Court of Appeals rely on the non-complexity of the issues as an excuse for a referee not to follow procedures as in *Greenberg v. Simms Merchant Police Service*, Fla. App., 410, So.2d 566, 567 (1982). The *Greenberg* court in support of its decision also quoted *Slattery v. California Unemployment Insurance Appeals Board*, 60 Cal.App.3rd 245, 131 Cal Rptr. 422, 425 (1976) which characterized telephone hearings "' as imaginative attempts to solve ...due problems.'" Solve? Telephonic hearings create due process problems.

Even when a claimant requested a telephonic hearing, the Pennsylvania Commonwealth Court in *Shegan v. Unemployment Compensation Board of Review*, 564, A.2d 1022, 1924 (Pa. Cmwlth. 1989) sided with a referee who refused to admit telephonic testimony "in light of the concerns expressed by this Court in *Knisley v. Unemployment Compensation Board of Review*, 501A.2d 1180(1985). In *Knisley*, the court addressed the "potential for procedural irregularities in telephonic hearings.

In *Babcock v. Employment Division*, 696 P.2d 19,21 (Or. App. 1985), the Oregon Court of Appeals conceded that credibility was the most difficult issue in these telephonic hearings. However, the *Babcock* court went on to trivialize the importance of unemployment compensation benefits to the citizenry by holding that "the audible indicia of a witness' demeanor are sufficient for a referee to make an adequate judgment as to believability."

The court in *Casey v. O'Bannon*, 536 F.Supp. 350, 352-353 (1982) ruled in a welfare benefits case that telephonic hearings withstood the *Mathews v. Eldridge*, 424 U.S. 319 (1976) balancing test. The *Casey* court found that the second *Mathews* factor "the risk of an erroneous deprivation through the procedures used " was not high as recipients argued.

The *Casey* court did concede that "visual observation of a witness is frequently an important tool to judge credibility." But to justify telephonic hearings, the court went on to discount this visual theory by accepting voice responses, pauses, levels of irritation and other factors as effective substitutes for assessing credibility. But even the *Casey* court was not oblivious to the fact that safeguards are needed.

The court in *Schexnider v. Blache, Office of Employment Security*, 504 So.2d 864, 867 (La. 1987) exposed more defects of telephonic hearings and ruled that a telephonic hearing violated due process when the claimant was not given the opportunity to subpoena witnesses.

Sterling v. District of Columbia, 513 A.2d 253, 255 (D.C. App. 1986) demonstrates another of a long list of problems in logistics inherent in telephonic hearings resulting in time-consuming court appeals. In *Sterling*, the appeals examiner cut of the petitioner's receptionist when she inquired as to the purpose of the call to the dentist's office. The examiner proceeded with the hearing without the dentist and ruled against the dentist. The *Sterling* court reversed the decision of the examiner only because of the manner in which the telephonic hearing was conducted. The *Sterling* court declining to follow *Simmons* below stated, however, that telephonic hearings on interstate claims do not violate due process.

In dictum, the court in *Simmons v. District Unemployment Compensation Board*, 292 A.2d 797, 799-800&n.4 (D.C. 1972), suggested that visual as well as aural observation of witnesses' demeanor might be required for a hearing to survive a due process challenge.

In *Logan v. Zimmerman Brush Co.*, 455 US 422, 432 (1982), this Court reiterated its position that "[w]hile the legislature may elect not to confer a property interest...it may not constitutionally authorize the deprivation of such an interest once conferred without appropriate procedural safeguards."

Clearly, the conflicting views all over the country as to what consitutes due process in reference to telephonic appeals must not go unnoticed by this Court.

As in *Fuentes v. Shevin*, 407 US 67, 91, n.22 (1983), the Court must reiterate that "[p]rocedural due process is not intended to promote efficiency or accommodate all possible interests;it is intended to protect the particular interests of the person whose possessions are about to be taken." In the case at bar, only the interests of the employer and the State were considered.

This Court must continue to be hypervigilant to insure that convenience does not substitute for justice. There are other more efficient ways to judicial economy. Due process rights must be not be compromised.

Many times claimants feel like Davids fighting the combination Goliaths of the employers and the State both of which have an interest to keep the money in the fund and deny benefits. The only weapon the claimant has is due process inherent in face-to face hearings.

Petitioner Chau Thai told it all so simply when she expressed in her inartful pro se papers speaking of herself: "over the phone.....she is at a disadvantage in defending herself."

CONCLUSION

Petitioner Chau Thai respectfully and fervently requests that this Court issue its Writ of Certiorari to address the impact of the telephonic appeals hearings on claimants' precious due process rights.

Respectfully submitted,

TINA VELANTZAS-AUSTIN
Counsel of Record
Attorney for Petitioner
The Court Commons
7 Elm Row
P.O. Box 780
New Brunswick, NJ 08903
(732) 247-5520

Dated: December 8, 1998

APPENDIX A - ORDER DENYING DISCRETIONARY REVIEW BY THE NEW JERSEY SUPREME COURT ENTERED SEPTEMBER 10, 1998

SUPREME COURT OF NEW JERSEY
C-2 September Term 1998
46,049

CHAU K. THAI,

Petitioner-Petitioner,

v. ON PETITION FOR CERTIFICATION

STATE OF NEW JERSEY, DEPARTMENT OF LABOR, BOARD OF REVIEW,

Respondent -Respondent.

FILED
SEP 11 1998
CLERK

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-2356-96 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 10th day of September, 1998.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE SUPREME COURT OF NEW JERSEY

CLERK OF THE SUPREME COURT

APPENDIX B - OPINION OF THE NEW JERSEY APPELLATE DIVISION DATED APRIL 29, 1996

NOT FOR PUBLICATION
WITHOUT THE APPROVAL OF
THE APPELLATE DIVISION

FILING DATE
APPELLATE DIVISION
APR 29 1998

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2356-96T1

CHAU K. THAI,

Petitioner-Appellant,

v.

BOARD OF REVIEW,

Respondent-Respondent.

Argued March 25, 1998 - Decided **APR 2 9 1998**

Before Judges Baime and Brochin

On appeal from a Final Decision of the Board of Review, Department of Labor

Tina Velantzas-Austin argued the cause for appellant Chau Thai (Chau Thai, on the pro se brief).

Appendix B

Ellen A. Reichart, Deputy Attorney General, argued the cause for respondent Board of Review, Department of Labor (Peter Verniero, Attorney General, attorney; Mary C. Jacobson, of counsel; Ms. Reichart, on the brief).

PER CURIAM

Claimant Chau Thai was employed by Olsten Staffing Services, a provider of temporary help. Her initial application for employment stated that she agreed to notify Olsten either by mail or telephone within forty-eight hours of termination of each job assignment. The application stated that Thai agreed that if she failed to give notice to Olsten that her assignment was terminated, Olsten could assume that she was not available for work.

Olsten assigned Thai to work for Bristol-Myers. In April 1996, the assignment ended. Thai submitted her time slip by mail. The time slip stated: "I agree to notify Olsten at the end of each assignment. If I fail to do so, Olsten may assume that I am not available for employment and I may be ineligible for unemployment benefits." The time slip also had a space for a check mark indicating availability for further employment. That space was left blank.

The Appeal Tribunal found that Thai did not check the box on her pay stub which indicated that she was available for work. It rejected as incredible Thai's contention that she had properly notified Olsten of her availability by indicating on the time slip that the job had concluded. It ruled that this failure was tantamount to abandoning her work. The Appeal Tribunal concluded that Thai quit her job without good cause attributable to the work and was disqualified for benefits pursuant to N.J.S.A. 43:21-5(a). The Board of Review affirmed the decision of the Appeal Tribunal.

Appendix B

Having carefully reviewed the entire record in this matter and the arguments of claimant and of the Attorney General, we conclude that the agency's determination is amply supported by substantial evidence in the record and is not arbitrary, capricious, or unreasonable. Accordingly, the decision appealed from is affirmed. See Barry v. Arrow Pontiac, Inc., 100 N.J. 57,71 (1985); Closter County Welfare Bd. v. New Jersey Civil Serv.Comm'n, 93 N.J. 384, 391 (1983); Doering v. Board of Review, 203 N.J. Super. 241, 245 (App. Div. 1985).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

Clerk

APPENDIX C - DECISION OF THE BOARD OF REVIEW, NEW JERSEY DEPARTMENT OF LABOR DATED DECEMBER 9, 1996

DECISION OF THE BOARD OF REVIEW

STATE OF NEW JERSEY	SS NUMBER: 148702636
DEPARTMENT OF LABOR	BR DOCKET #: 96-B-05666-000-X0
BOARD OF REVIEW	AT DOCKET #: 96-A-15988-000-R0
CN-937	DATE OF CLAIM: 04/28/96
TRENTON NJ 08625-0937	DATE OF APPEAL: 10/16/96
	MAILING DATE: 12/09/96

IN THE MATTER OF: CHAU K THAI

CHAU K THAI
5 SHANNON CT
SOMERSET NJ 088730000

EMPLOYER:

The claimant filed a timely appeal from a decision of the Appeal Tribunal (96-A-15988-000-R0) mailed 10/08/96.

This matter is reviewed on the record below.

FINDINGS OF FACT AND OPINION:

The Findings of Fact and Opinion as developed by the Appeal Tribunal and the allegations of the appellant have been carefully examined.

Since the appellant was given a full and impartial hearing and a complete opportunity to offer any and all evidence, there is no valid ground for a further hearing.

Appendix C

On the basis of the record below, we agree with the decision reached.

DECISION:

The decision of the Appeal Tribunal (96-A-15988-000-R0) is affirmed.

BOARD OF REVIEW

/s/ VINCENT C. MARTORANO

/s/ JOSEPH SIEBER

/s/ CORNELIA A. CALDERONE

APPENDIX D - DECISION OF THE APPEAL TRIBUNAL, NEW JERSEY DEPARTMENT OF LABOR DATED OCTOBER 8, 1996

DECISION OF THE APPEAL TRIBUNAL

State of New Jersey	S.S. # 148702686
Department of Labor	Docket # 96-A-15988-000-R0
Division of Programs	LO 952 PC 10
APPEAL TRIBUNAL	Date of Claim 04/28/96
CN 936 LABOR BUILDING	Appellant claimant
Trenton, NJ 08625-0936	Date Det Mailed 05/30/96
	Date AT Dec Mailed 10/08/96

IN THE MATTER OF: CHAU K THAI

CHAU K THAI
5 SHANNON CT
SOMERSET NJ 088730000

EMPLOYER: OLSTEN STAFFING SERVICES

FOR GOOD CAUSE SHOWN, THE MATTER IS REOPENED AS OF 8/27/96.

The claimant and the employer participated in a telephone hearing.

FINDING OF FACT:

The claimant and the employer appealed from a decision of the Appeal Tribunal (AT-96-A-15988-000-X0) which modified the determination of the Deputy and held the claimant ineligible for benefits from 4/28/96 to 7/6/96 on the ground she was unavailable for work.

Appendix D

The Board of Review (BR-96-B-04116-000-X0), by order mailed on 8/27/96, remanded the matter to an Appeal Tribunal for rehearing and a new decision.

The claimant appealed on 06/04/96 from a determination of the Deputy, mailed on 05/30/96, holding her disqualified for benefits from 04/07/96 or the ground that she left work voluntarily without good cause attributable to such work.

The claimant was employed as a cost accountant through the above-name temporary employment service from December 1994 to 4/5/96. That job was completed. The claimant then did not contact the employer for work afte that.

The claimant had a written agreement with the employer that she must contact the temporary employment service at the end of the work assignment The pay stubs, which she signed on 4/5/96, stated the following:

> "I AGREE TO NOTIFY OLSTEN AT THE END OF EACH ASSIGNMENT. IF I FAIL TO DO SO, OLSTEN MAY ASSUME THAT I AM NOT AVAILABLE FOR EMPLOYMENT AND I MAY BE INELIGIBLE FOR UNEMPLOYMENT BENEFITS."

The claimant checked off the pay stubs the job was completed. She left the check mark for availability blank. She also did not contact the employer for work after that.

OPINION:

N.J.S.A. 43:21-5 reads as follows:

> An individual shall be disqualified for benefits:
>
> (a) For the week in which the individual has left work voluntarily without good cause attributable to such work,, and for each week thereafter until the individual becomes

reemployed and works four weeks in employment which may include employment for the Federal Government and has earned in employment at least six times the individual's weekly benefit rate, as determined in .each case.

N.J.A.C. 12:17-13.1

(a) "Temporary help service form" means a business which consists of employing individuals directly or indirectly for purpose of assigning the employed individuals to assist the firm's customers in the handling of the customer's temporary, excess or special work loads, and who, in addition to the payment of wages or salaries to the employed individuals, pay federal social security taxes and state and federal unemployment insurance carries workers compensation insurance as required by State law. The temporary help service firm is required to comply with provisions of P.L. 1960, c. (N.J.S.A. 56:8-1 et seq.)

(B) "Written agreement" means a signed understanding between a temporary help service form and the employee which outlines the scope of employment and includes the general type of work to be performed, salary parameters and acceptable commuting distance for assignments. The agreement shall require that the employee contact the temporary help service firm upon completion of an, assignment state that unemployment benefits may be denied for failure to fulfill this obligation.

N.J.A.C. 12:17-13.2 Employment with temporary help service firm under written agreement

(a) If an individual whose clam is based on employment with a temporary help service firm is offered a new assignment and fails to accept continuing employment from the firm within the scope of employment as outlined in the written agreement and definite starting date of the new assignment is no later than four weeks from the ending of the current

Appendix D

assignment, the claim for benefits shall be reviewed as a voluntary leaving of work under the provisions of N.J.S.A. 43:21-5(a). If the firm's offer of a new assignment contains terms and conditions of employment that are substantially different from those outlined in the written agreement of the starting date of the new assignment is indefinite or more than four weeks from the ending date of the current assignment, then the claim for benefits shall be reviewed as a suitable work issue under the provisions of N.J.S.A. 43:21-4(c).

(b) An individual's claim which is based on employment with a temporay help service firm shall be reviewed as a voluntary leaving of work issue under the provisions of N.J.S.A. 43:21-5(a) of the individual fails to contact the temporary help service form for reassignment in accordance with the terms of the written agreement.

In this case, the claimant failed to contact her employer for work after the conclusion of her assignment through a temporary employment agency. This is tantamount to job abandonment. The allegation of the claimant that sending a pay stub to the employer and telling them the job ended is contacting the employer for work is rejected as not credible. Further, she did not check off that she was available for work with them as well. The claimant quit her employment without good cause attributable to the work as defined in N.J.S.A. 43:21-5(a).

The claimant is disqualified for benefits under N.J.S.A. 43:21-5(a) as of 4/7/96, as she left work voluntarily without good cause attributable to such work.

The matter of the claimant's potential liability for refund of benefits received is remanded to the Director for an initial determination ir accordance with established procedures.

DECISION:

Appendix D

The claimant is disqualified for benefits under N.J.S.A. 43:21-5(a) as of 4/7/96, as she left work voluntarily without good cause attributable to such work.

The determination of the Deputy is affirmed.

REOPENED : 8/27/96
HEARING : 9/24/96
DATED : 10/2/96
TYPED : 10/7/96
UA

/s/ John Loetscher
Appeals Examiner I

JML/dac

cc:
L.O. 952
CHAU K THAI
OLSTEN STAFFING
OLSTEN STAFFING SERVICES
REFUND PROCESSING SECTION

APPENDIX E - NOTICE OF IN-PERSON HEARING DATED SEPTEMBER 11, 1996

NOTICE OF IN-PERSON HEARING

State of New Jersey
Department of Labor

Division of Programs
CN 936
Labor Building
Trenton, New Jersey 08625-0936

SS# 148-70-2686
Docket No.: 96-A-15988-000-R0
LO: 952 PC: 10
DOC: 4/28/96
Appellant: Claimant
Mailing Date: 09/11/96

APPEAL TRIBUNAL
IN THE MATTER OF: CHAU K. THAI

CHAU K. THAI
5 SHANNON CT
SOMERSET, NJ 088730000

BEFORE APPEALS EXAMINER: John Loetscher
TELEPHONE NO: 6097773258

The parties will participate in the hearing in person. PLEASE APPEAR ON THE DATE, TINE, AND PLACE OF HEARING.

DATE: 9/23/96
TIME: 10:40am
PLACE: 506 JERSEY AVENUE
UNEMPLOYMENT OFFICE
NEW BRUNSWICK, NJ 08901-2628

The issue(s) involved are:
VOLUNTARY LEAVING
NON FRAUD REFUND

PLEASE READ THE REVERSE SIDE OF THIS FORM FOR ADDITIONAL INFORMATION CONCERNING THE APPEAL PROCEDURE.

Appendix E

THIS HEARING WILL NOT BE POSTPONED UNLESS COMPELLING CAUSE IS PROVIDED BY IMMEDIATE REQUEST TO THE ABOVE-NAMED APPEALS EXAMINER AND SUCH REQUEST IS RECEIVED PRIOR TO THE HEARING DATE. HEARINGS NORMALLY START PROMPTLY AT THE TIME SCHEDULED: THEREFORE IT IS IMPORTANT TO BE AT THE SCHEDULED PLACE AT THE SCHEDULED TIME. If the party appealing the determination fails to appear at the time of the scheduled hearing, the appeal may be dismissed f or non-appearance. INTERPRETER: If you need an interpreter, you must bring one with you to the hearing. Call the Appeals Examiner if you cannot obtain one.
INTERPRETE: Si necesita un interprete, por favor trae uno para su cita. Debe llamar el "Appeals Examiner" si no puede obtener un interprete.
NOTICE OF ADDRESS CHANGE: If you have a change of address after the filing of your appeal, notify the claims office and the Appeal Tribunal immediately.

While the appeal is pending, the claimant must CONTINUE to mail in the mail certification work search record and the pended continued claim for unemployment benefits on the dates designated by the claims office.

APPENDIX F - DECISION OF THE BOARD OF REVIEW, NEW JERSEY DEPARTMENT OF LABOR DATED AUGUST 27, 1996

STATE OF NEW JERSEY	SS NUMBER: 148702686
DEPARTMENT OF LABOR	DR DOCKET #: 96-B-04116-000-X0
BOARD OF REVIEW	AT DOCKET #: 96-A- 15988-000-X0
CN-937	DATE OF CLAIM: 04/28/96
TRENTON, NJ 08625-0937	DATE OF APPEAL: 07/24/96
	MAILING DATE: 08/27/96

IN THE MATTER OF: CHAU K THAI

ORDER TO REMAND

CHAU K THAI
5 SHANNON CT
SOMERSET NJ 088730000

EMPLOYER: OLSTEN STAFFING SERVICES CORP

The claimant and employer having filed timely appeals from a decision of an Appeal Tribunal; and

It appearing there is need for additional testimony from the claimant and employer as the tape recording of the previous hearing is incomplete and inaudible;

It is on 08/27/96

ORDERED that the case (96-A-15988-000-X0) is remanded to the Appeal Tribunal for a hearing and a decision on all issues.

IT IS FURTHER ORDERED that a copy of any new Decision or Order resulting from this remand shall, immediately upon issuance, be transmitted to the Executive Secretary of the Board of Review.

Appendix F

BOARD OF REVIEW
/s/ CORNELIA A. CALDERONE
/s/ FRANK SERICO

RC:ky
D
cc: FILE
952
CHAU K THAI
OLSTEN STAFFING SERVICES CORP
REFUND PROCESSING SECTION

NOTE: This matter will he scheduled for an Appeal Tribunal hearing as soon as possible and you will be notified in writing of the date, time and place of the hearing. If you have any questions regarding the schedullng of this hearing, they should be referred to the Appeal Tribunal, Department of Labor, CN 936, Trenton, NJ 08625-0936.

IMPORTANT:

This decision will become final, unless, within ten days of the date of mailing, an appeal is filed with the Board of Review, Department of Labor, Labor Building, CN 937, Trenton, New Jersey 08625-0937. Please specify the reasons for your appeal.

IMPORTANTE:

Esta decision sera final, a menos, que en dien dias desde la fecha dc envio, una apelaion dea llenada al panel de revision (The Board of Review, Department of Labor, Labor Building, CN 937, Trenton, New Jersey 08625-0937).

APPENDIX G - DECISION OF THE APPEAL TRIBUNAL, NEW JERSEY DEPARTMENT OF LABOR DATED JULY 18, 1996

DECISION OF THE APPEAL TRIBUNAL

State of New Jersey	SS # 148702686
Department of Labor	Docket # 96-A-15988-000-X0
Division of Programs	LO 952 Pc 10
APPEAL TRIBUNAL	Date of Claim 04/28/96
CN 936 LABOR BUILDING	Appellant claimant
Trenton, NJ 08625-0936	Date Det Mailed 05/30/96
	Date AT Dec Mailed 07/18/96

IN THE MATTER OF: CHAU K THAI

CHAU K THAI
5 SHANNON CT
SOMERSET NJ 088730000

EMPLOYER: OLSTEN STAFFING SERVICES INC.

The claimant appealed on 06/04/96 from a determination of the Deputy, mailed on 05/30/96, holding her disqualified for benefits from 04/07/96 on the ground that she left work voluntarily without good cause attributable to such work.

The claimant and the employer participated in a telephone hearing. The claimant and the employer appeared at an earlier hearing.

FINDING OF FACT:

The claimant was employed as a cost assistant through the above-named temporary employment service from 12/1/94 to 4/5/96. She earned $13.00 an hour. The assignment ended.

Appendix G

The claimant did not contact the above-named temporary employment service for work after that. Work was available for the claimant. The employer tried to contact the claimant for work but did not have a current phone number for the claimant.

At the time of separation for work through the above-named temporary employment service, the claimant was made aware she should contact the above-named temporary employment service for work.

There was no written contract after 2/20/96 requiring the claimant to contact the employer for work at the conclusion of an assignment. Likewise, there was no written contract after 2/20/96 specifying what type of work would be offered to the claimant.

OPINION:

N.J.S.A. 43:21-5 reads as follows:

> An individual shall be disqualified for benefits:
>
> (a) For the week in which the individual has left work voluntarily without good cause attributable to such work, and for each week thereafter until the individual becomes reemployed and works for weeks in employment which may include employment for the Federal Government and has earned in employment at least six times the individual's weekly benefit rate, as determined in each case.

N.J.A.C. 12:17-13.1

(a) "Temporary help service form" means a business which consists of employing individuals directly or indirectly for purpose of assigning the employed individuals to assist the firm's customers in the handling of the customer's temporary, excess or special work loads, and who, in addition

to the payment of wages or salaries to the employed individuals, pay federal social security taxes and state and federal unemployment insurance carries workers compensation insurance as required by State law, temporary help service firm is required to comply with provisions of P.L. 1960, c. (N.J.S.A. 56:8-1 et seq.)

(B) "Written agreement" means a signed understanding between a temporary help service form and the employee which outlines the scope of employment and includes the general type of work to be performed, salary parameters, and acceptable commuting distance for assignments. The agreement shall require that the employee contact the temporary help service firm upon completion of an, assignment and state that unemployment benefits may be denied for failure to fulfill this obligation.

N.J.A.C. 12:17-13.2 Employment with temporary help service firm under a written agreement

(a) If an individual whose claim is based on employment with a temporary help service firm is offered a new assignment and fails to accept continuing employment from the firm within the scope of employment as outlined in the written agreement and definite starting date of the new assignment is no later than four weeks from the ending of the current assignment, the claim for benefits shall be reviewed as a voluntary leaving of work under the provisions of N.J.S.A. 43:21-5(a). If the firm's offer of a new assignment contains terms and conditions of employment that are substantially different from those outlined in the written agreement of the starting date of the new assignment is indefinite or more than four weeks from the ending date of the current assignment, then the claim for benefits shall be reviewed as a suitable work issue under the provisions of N.J.S.A. 43:21-4(c).

(b) An individual's claim which is based on employment with a temporary help service firm shall be reviewed as a voluntary leaving of work issue under the provisions of

Appendix G

N.J.S.A. 43:21-5(a) if the individual fails to contact the temporary help service firm for reassignment in accordance with the terms of the written agreement.

As there was no written contract between the claimant and the employer signed after 2/20/96, a voluntary quit disqualification does not apply.

No disqualification applies under N.J.S.A. 43:21-5(a), as the claimant did not leave her job voluntarily without good cause attributable to such work.

N.J.S.A. 43:21-4 provides that an unemployed individual shall be eligible to receive benefits with respect to any week only if it appears that:

> (c) The individual is able to work, and is available for work, and has demonstrated to be actively seeking work...

A person who is genuinely attached to the labor market and desires employment will make every reasonable effort to find work.

"The further requirement that the claimant must demonstrate that 'he is actively seeking work' means that he must do more than being passively available for work. He must make a sincere effort to obtain employment either in his usual type of work or in such other suitable work he may be able to do." Worsnop v. Board of Review, 92 N.J. Super. 260, 265 (App. Div. 1966).

The claimant did not contact the above-named temporary employment agency for work at the conclusion of her assignment. Work was available to her through the above-named temporary employment service. The claimant demonstrated by her action that she was unavailable for work from 4/28/96 through 7/6/96 as defined in N.J.S.A. 43:21-4(c).

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DECISION:

No disqualification applies under N.J.S.A. 43:21-5(a), as the claimant did not leave her job voluntarily without good cause attributable to such work.

The claimant is ineligible for benefits from 4/28/96 through 7/6/96, as she was unavailable for work, in accordance with N.J.S.A. 43:21-4(c).

The determination of the Deputy is modified.

APPEAL : 6/4/96
HEARINGS : 7/9/96 & 7/2/96
DATED : 7/10/96
TYPED : 7/16/96
UA

/s/ John Loetscher
Appeals Examiner I

JGB/dac

cc :
L.O. 952
CHAU K THAI
OLSTEN STAFFING
REFUND PROCESSING SECTION

IMPORTANT:

This decision will become final, unless, within ten days of the date of mailing, an appeal is filed with the Board of Review, Department of Labor, Labor Building, CN 937, Trenton, New Jersey 08625-0937. Please specify the reasons for your appeal.

IMPORTANTE:

Appendix G

Esta decision sera final, a menos, que en dien dias desde la fecha c envio, una apelaion dea llenada al panel de revision (The Board of Review, Department of Labor, Labor Building, CN 937, Trenton, New Jersey 08625-0937).